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Paul Leo Oberst  
*University of Kentucky*

Thomas P. Lewis  
*University of Kentucky*

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# Claims Against the State of Kentucky— The Board of Claims\*

By PAUL OBERST\*\* AND THOMAS P. LEWIS\*\*\*

The newest breach in Kentucky's sovereign immunity is the act of the legislature providing for payment of negligence claims against the state through the State Board of Claims. This legislation, providing an administrative remedy to supplement existing judicial and legislative remedies, had its origin in an act of 1946 setting up a Highway Board of Claims with jurisdiction over claims for personal injury or property damage due to negligence in the construction, reconstruction, maintenance or policing of highways by the Highway Department. In 1950, the jurisdiction was extended to any acts of negligence on the part of the Commonwealth, its departments, agencies or employees, and the maximum amount recoverable was raised from \$1,000 to \$5,000. Over 750 claims have already been filed and this remedy has become the most important method by which the injured individual may recover from the Commonwealth.

This article will consider first the organization, jurisdiction and procedure of the Board of Claims; second, the substantive output to show what kinds of claims are made and what kinds are allowed by the Board; and finally suggestions will be made for improvement.

## *Organization*

The Board is a three-man body composed of a Judge of the Court of Appeals, the State Attorney General and the State Commissioner of Finance.<sup>1</sup> The Board elects one of its members as

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\* This article is the third of a series on the liability of the Commonwealth. The fourth and final article, dealing with special resolutions of the legislature allowing claims or suit on claims, will appear in the November, 1954, issue.

\*\* A.B., Evansville College; LL.B., University of Kentucky; LL.M., University of Michigan. Professor of Law, University of Kentucky, Lexington, Kentucky.

\*\*\* LL.B., University of Kentucky; former Editor-in-Chief, Kentucky Law Journal.

<sup>1</sup> Provision for these members is found in Ky. REV. STAT. 44.070 (1953). A commissioner of the Court of Appeals may be appointed by the Chief Justice instead of an associate judge. At present Associate Judge John Moreman is the judicial member. No definite term of office is prescribed for the judicial member; he serves at the pleasure of the Chief Justice.

chairman. Pursuant to KY. REV. STAT. 44.080, the Board has adopted its own rules of organization and practice.<sup>2</sup> Under the present rules, meetings of the Board of Claims are held in the clerk's office in the Capitol Annex in Frankfort on the third Monday in January, May and September. Recently the Board has been holding special meetings to pass on nonhearing claims, usually on the first Monday of the month. It is at these meetings that all claims finally are allowed or rejected, but prior to this stage an individual claim will have been "processed" by other persons who have a part in the administrative procedure. Two such persons who are attached to the Board of Claims are the clerk of the Board and the referee. The clerk occupies an office in Frankfort and maintains files containing the pleadings, correspondence, transcripts of hearings and other information pertaining to each claim. She also carries on the bulk of official correspondence, and, under the direction of the Chairman of the Board, prepares the schedules of hearings, and mails notices of hearings and subpoenas to the plaintiff and defendant. The referee, according to the rules of the Board, performs such functions as from time to time may be prescribed by the Board. Briefly, his duties consist of conducting hearings and preparing a report of his findings of law and fact and a recommendation concerning the award and its amount. He may also make a report in cases in which the facts are stipulated. At the present time there are two referees, one for Eastern Kentucky and one for Western Kentucky. Another participant in the claims procedure is the attorney representing the defendant agency or department. This will be an assistant attorney general assigned to the particular agency or department.<sup>3</sup>

### *Jurisdiction*

Before entering a discussion of the practice before the Board it is important to define exactly what claims fall within its jurisdiction. KY. REV. STAT. 44.070 limits the Board's jurisdiction to compensating persons for damages "sustained to either person or prop-

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<sup>2</sup> These rules are published in mimeograph form and can be obtained by writing the clerk of the Board, whose office is in Frankfort in the Capitol Annex. They are also available in the Kentucky Administrative Regulations Service published by the Reviser of Statutes. The regulations are in the process of revision.

<sup>3</sup> KY. REV. STAT. 44.090 (1953) seems to contemplate designation of one assistant to represent all departments. The practice is for each assistant to represent the particular department to which he is regularly assigned.

erty as a proximate result of negligence on the part of the Commonwealth, any of its departments or agencies, or any of its agents, or employees while acting within the scope of their employment. . . ." Intentional injuries and acts giving rise to absolute liability are not redressable before the Board of Claims.<sup>4</sup>

Under some circumstances a claimant may have a remedy both in the Board of Claims and in circuit court. For example, if the Department of Highways negligently damages a citizen's property in such a way or to such an extent as to constitute a "taking" of property, the landowner may be allowed a suit in the circuit court under the theory of reverse eminent domain.<sup>5</sup> At the same time, he has an actionable claim before the Board because his damage resulted from the negligence of a state department. Does the new Board remedy oust the courts of their jurisdiction in these cases? KY. REV. STAT. 44.160 provides:

*Filing of claims as optional remedy.* KRS 44.070 to 44.160 [statutory provisions which create the Board of Claims] shall not be construed to deprive any person whose claim amounts to more than \$5,000 from suing in the courts, where such rights exist or *would have existed* if KRS 44.070 to 44.160 had not been enacted into the laws of this Commonwealth. . . . (Italics writers')

By express provision it is seen that a claim for more than \$5,000 can still be prosecuted in circuit court if the facts fall within the theory of reverse eminent domain. However, the very existence of such a provision would seem to imply that where the claim is for \$5,000 or less, and thus redressable completely under the Board of Claims provisions, the Board remedy is exclusive. Weight is added to this interpretation by the words italicized in the above quotation, "would have existed." If a right to sue in the courts "would have existed" if the Board of Claims Act had not been enacted, the necessary implication seems to be that where complete relief can be had under the Board, the "right" no longer exists and the Board relief is exclusive. Against these arguments,

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<sup>4</sup> Compare the Federal Tort Claims Act which creates sovereign liability for the torts of its agents, then excepts from coverage practically all, if not all, intentional acts. 62 STAT. 933, 28 U. S. C. § 1346 (b) (Supp. 1952), read with 63 STAT. 984, as amended, 28 U. S. C. § 2680 (Supp. 1952).

<sup>5</sup> For a discussion of this theory and its ramifications, see the second article of this series, *Claims Against the State—Reverse Eminent Domain*, 42 Ky. L. J. 163 (1954).

however, is the title to 44.160 quoted above, "Filing of claims as *optional* remedy." If the remedy were truly optional suit in the courts should lie where the damages asked are less than \$5,000, otherwise the Board remedy would never be optional, except in the sense that a claimant might have an option between seeking full damages in the courts and seeking partial damages up to \$5,000 before the Board.

The same problem exists in regard to special acts. Obviously, under KY. REV. STAT. 44.160 a claimant can seek a special resolution when his damages exceed \$5,000, but can he if his damage is \$5,000 or less? Of course practicalities would seem to demand that where a simple method of relief is available, the claimant would not undertake the burdensome job of obtaining a special act, unless he is under some illusion about the generosity of Kentucky juries. Even if the legislature *could* pass the special act, the fact that the petitioner has an available remedy would have great weight as a factor in favor of denying his request.

Several cases have arisen which presented an opportunity to the Court of Appeals to decide whether the Board of Claims Act creates an exclusive remedy where it is applicable, but the question appears not to have been raised by counsel, and the court has not yet passed on the issue.<sup>6</sup>

### *Procedure*

*Initiating the claim.\** It is provided in the rules adopted by the Board that pleadings and practice before the Board shall be governed by the Kentucky Code of Practice in civil cases relating to circuit courts having terms. Changes are being made to reflect the recent adoption of new rules for civil practice in the state. Under the new regulations, an action is commenced by filing a

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<sup>6</sup> In discussing the procedure before the Board of Claims conclusions will be drawn from the claims filed against the Highway Department unless otherwise indicated, since the Department is the defendant in the overwhelming majority of claims.

<sup>\*</sup> For example, see *Commonwealth v. Kelley*, 314 Ky. 581, 236 S.W. 2d 695 (1951). Oddly enough, although the courts do not seem to be bothered by the suggested lack of jurisdiction, the Board has had some doubt as to whether it should entertain claims which could have been brought in circuit court. This is of primary importance since the chief concern of this article is whether the Board will accept a claim, not whether the claimant might have an alternative remedy in circuit court. Therefore, the problem from the viewpoint of the Board will be treated more thoroughly in the section of this article on the substantive law of the Board.

complaint with the clerk of the Board of Claims in Frankfort. This complaint must be filed within one year of the accrual of the cause of action.<sup>7</sup> To insure efficient and speedy processing of claims, a complaint should be drawn which states a claim for which relief can be granted and which will withstand the scrutiny of an adversary attorney. Two copies of the complaint must be filed with the clerk, one to be docketed and placed in the file which will eventually contain all matters thereafter relating to the claim, the other to be sent by the clerk to the assistant attorney general in charge of defending the department against which the claim is made.<sup>8</sup> No summons need issue on any pleading.<sup>9</sup>

It is specified in the rules of the Board that only one copy of any pleading subsequent to the complaint need be filed with the clerk by the parties provided the endorsement appears thereon that a copy has been sent to the adversary attorney. The answer and other responsive pleadings must be filed within twenty days from the filing of the pleading requiring the response.<sup>10</sup> Pleadings which raise questions of law must, upon the written request of a party, be certified by the clerk to the Board for decision. A memorandum of points and authorities *must* accompany such pleading and a copy thereof should be submitted to the other party.<sup>11</sup>

*Informal claims.* In accordance with section 705 of Carroll's Code of Civil Procedure, a petition was unnecessary for claims of \$50.00 or less. Informal pleadings were sufficient and consequently such small claims could be initiated before the Board by letter. Section 705 has been repealed and the Rules of Civil Procedure make no similar provision. Although no specific rules have been formulated by the Board for small claims, certain practices nevertheless developed and whether official or not appeared to be followed rather consistently.

It is only natural that an informal claim was not required to state a technical cause of action under the Code. Whatever informality may be allowed under the Rules of Civil Procedure, it is in the claimant's interest to set forth certain details to facilitate

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<sup>7</sup> KY. REV. STAT. 44.110 (1953).

<sup>8</sup> Rules of Practice and Procedure of the Kentucky Board of Claims (1950).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* The Board meets to approve or reject claims only three times a year as noted previously, but for the consideration of matters of law such as motions, demurrers, etc., the Board is in continuous session. *Ibid.*

the consequent investigation. Such facts as the date and place of the accident, the amount and proof of damages (if an automobile accident is the basis of damages, the most acceptable proof is two estimates of repair costs by reputable garagemen), any pertinent information which will help to identify the person and vehicle, if any, through which the injury occurred, and any reference within the knowledge of the claimant to reports filed by state officials in regard to the accident should be included. Completed claims indicate that none of the above details, though desirable, has been absolutely necessary; for example, several claims have been initiated by nothing more than the filing of a repair bill with the clerk,<sup>12</sup> while others have contained other facts but omitted the amount of damages. Other practices which are peculiar to letter claims will be mentioned as they arise in the further discussion of procedure.

*Hearings.* After the complaint is filed the assistant attorney general decides whether or not to contest. If he decides to contest, the clerk schedules a hearing before the referee, and when there are enough disputed claims in one section of the state to make a trip worthwhile, the referee and the assistant attorney general travel to that section for the hearings, saving the claimants, their attorneys, and the witnesses a trip to Frankfort.

The hearings, under the rules of the Board, can be upon the testimony of witnesses or upon depositions, but in the latter case only by order of the Board upon a finding that to do otherwise is impracticable. In addition, the testimony of a witness may be taken upon interrogatories after a proper showing before the referee that the witness cannot be present and provided the evidence so taken is not cumulative. An early claim indicates also that a hearing may be had upon the law only, *i.e.*, a stipulation of facts with submission of the case to the referee on briefs as to a disputed question of law.<sup>13</sup>

As in hearings before most administrative bodies, the rules of evidence applicable in hearings before the referee are relaxed somewhat from those applicable in an ordinary suit. The exact bounds of admissible evidence are not clearcut; rather than aban-

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<sup>12</sup> See Bd. of Cl. #148 (1949); Bd. of Cl. #149 (1949); Bd. of Cl. #163 (1949); Bd. of Cl. #388 (1951).

<sup>13</sup> Bd. of Cl. #18 (1948).

don the legal rules of evidence altogether the Board has left their application pretty much to the discretion of the referee:

Technical rules of evidence shall not be required but the admission of testimony shall be to determine fairly, expeditiously and economically the controversy, and to that end follow as nearly as may be the established rules of evidence and procedure as administered in the Courts of Kentucky.<sup>14</sup>

The end result would seem to be that only legally competent evidence should be admitted, so long as legally competent evidence exists and is practicably obtainable. In the absence of some legally competent evidence on a point in issue, something less should be admitted, and a valid order may be based thereon.

In the hearing the referee sits as both judge and jury and is specifically commanded by the rules of the Board to make separate findings of law and fact. Nothing is contained in the Board rules as to the weight of the findings, but the findings of fact would seem to be considered *prima facie* correct, as are the findings of a master. Certainly none of the referee's findings is conclusive, and it is entirely possible that his findings are technically no more weighty or conclusive than the findings of, say, an examiner for the Motor Transportation Department. Whatever the actual rule, it will be seen that for all practical purposes the Board gives great weight bordering on conclusiveness to the referee's findings of fact.

Upon his findings the referee files a report recommending an award in a stated amount or a dismissal. Although such procedure is not required by the Board, the referee as a matter of expediency has been making a finding on the damages issue even in the cases he recommends for dismissal. If the Board decides to overrule him and make an award, an amount of damages ascertained by the man who heard the testimony and observed the parties and witnesses is in the record for the Board's guidance. The report of the referee is much like a trial court's opinion when such an opinion is written. The referee makes his findings of fact, discusses the case and statutory law bearing on the controversy, and then draws his conclusions as to the merits of the claim.

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<sup>14</sup> Rules of Practice and Procedure of the Kentucky Board of Claims (1950).



As might be expected, the larger a claim is the more likely it is to be carried to a hearing. Very few claims for less than \$50.00 have gone to a hearing, not only because of the expense, but also and perhaps largely because of the unsuitability of a hearing to claimants who are ordinarily not represented by counsel. No petition existed in most small claims, and if the defendant asserted an affirmative defense to which there had to be a reply within fifteen days, the claimant was likely to be caught off guard. If a small claim was taken to hearing, however, the claimant could obtain counsel and let him assume responsibility from that point forward. And in at least one claim, the referee treated an unrepresented claimant's appearance at the hearing as sufficient reply to a defense.<sup>15</sup>

*Nonhearing claims—settlements and stipulations.* About 356 of the first 500 claims did not go to a hearing before the referee, either on oral testimony or deposition, so these nonhearing claims are numerically more important in a discussion of Board procedures than the hearing claims. This is rather unusual in view of the fact that no provision is made either in the Board of Claims Act or in the rules of the Board for settlement of claims, it apparently being contemplated that all claims be heard by the Board or its representative, the referee.

Since there is no provision giving the assistant attorney general power to settle or compromise a claim, theoretically each claim must go from the initial pleading to judgment by the Board irrespective of the certainty of the state's liability. Often claims arise which if brought against a private corporation would be promptly settled to avoid the unnecessary expense of litigation. An assistant attorney general cannot technically settle a claim as counsel for a corporation might, but a fairly standard procedure for achieving the same result has evolved from the practice of defending claims against the Highway Department.

The evolution began in the early days of the Board when the assistant attorney general, having decided not to contest a claim but lacking the power simply to settle, would typically file an answer admitting liability but denying the amount of damages. Then upon receiving some adequate proof of the amount of dam-

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<sup>15</sup> Bd. of Cl. #533 (1953).

ages, he would file a pleading confessing judgment for that amount and the claim would be sent to the Board on the pleadings.<sup>16</sup>

Until the processing of claim number 68—filed one year after the first claim—the referee did not report on claims unless there was a hearing. Procedure for reaching a settlement had become lax immediately previous to claim 68—often no answer at all was filed—and it was apparently this laxity which prompted the change. Beginning with claim 68 and continuing to the present, the referee has usually filed a report setting forth the facts and his recommendation whether the claim has been contested or not and irrespective of the amount of damages.

With the development of the practice of the referee's reporting on nonhearing claims, the need arose for some material upon which he could base his recommendations. The use of stipulations resulted. The demand for stipulations in nonhearing claims came from the referee, not from the rules of the Board, and was evidently for the referee's own protection. Generally the use of stipulations has been limited to claims for over \$50.00. Because of the function they serve, the stipulations of fact prepared by the assistant attorney general are not strictly the same thing as stipulations employed by counsel in court suits. They do not serve solely to remove agreed issues of fact from the realm of litigation, leaving only the disputed issues for the judge or jury. In the Board of Claims practice, they replace the hearing completely when used. Of course in many claims the facts stipulated are those which the assistant attorney general actually believes to be the true facts.

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<sup>16</sup> This procedure has resulted in claims which on their face appear to have been handled loosely although in fact allowance of the claims may have been completely warranted. For example, one petition made no allegation of acts of negligence but instead of demurring, the assistant attorney general answered, "No defense." Bd. of Cl. #77 (1947). In another claim it appears from the record that the assistant attorney general or his staff drew up the petition for the claimant after receiving a letter in which claimant stated the facts. Bd. of Cl. #129 (1949). Another time, a stipulation of facts signed by the parties served as the pleadings. Bd. of Cl. #150 (1949); see also Bd. of Cl. #194 (1950). Even jurisdictional defects have been ignored—the assistant attorney general admitted allegations of petition which predicated relief upon an implied contract, then stipulated facts from which negligence appeared. Bd. of Cl. #116 (1948). In some claims the necessity of going through the motions of litigation when the assistant attorney general is willing to settle has been costly. For example a claimant by letter sought \$553.00 damages for injuries to himself and his wagon and mule. He was informed that although liability was *admitted* a petition would be necessary. Back came a petition, but this time damages asked were \$2165.00. After a hearing over the disputed damages, claimant was awarded \$769.00—still more than \$200.00 above his original request. Bd. of Cl. #167 (1951).

Sometimes, however, it may be that the assistant attorney general is not completely satisfied that his department is liable, but in order to avoid the chance of losing a claim for a large amount of damage he may be willing to compromise and agree to liability for reduced damages. Thus facts may be stipulated which are in issue for the purpose of affording the referee a set of facts from which he can easily infer negligence on the part of the Department.

The "typical" nonhearing claim now takes this form: answer is filed stating "no defense" or admitting the allegations; a stipulation of facts and usually of damages is signed by the parties (after negotiation); the pleadings and stipulation are sent to the referee who finds negligence from the facts and recommends an award.<sup>17</sup>

The introduction of the stipulation into the practice before the Board did not replace all other evidence in nonhearing claims, although if a stipulation is filed the referee will be guided by it without any supporting evidence. If a stipulation is not filed, reference may be made by the referee to the reports on the accident in question<sup>18</sup> or to affidavits filed by the claimant.<sup>19</sup> And there is no inherent lack of power to prevent the referee from recommending an award on the pleadings only<sup>20</sup> since the Board has confirmed many claims on the pleadings without a referee's report.

Since the decision whether to deny or admit the allegations of a claimant rests with the assistant attorney general, it is important to know the facts and evidence upon which the assistant attorney general relies in making this decision. When an accident occurs which involves the Highway Department a report is filed by a safety supervisor or district engineer or both. In these reports there is generally an opinion expressed as to who was at fault, and the district engineer recommends that the Department assume or reject liability. That great weight is placed upon these reports, especially the district engineer's, is indicated by the fact that the conclusions of the assistant attorney general to contest or settle are seldom contrary to the recommendations. In addition to this

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<sup>17</sup> For example, see Bd. of Cl. #174 (1950); Bd. of Cl. #294 (1951); Bd. of Cl. #453 (1951); Bd. of Cl. #616 (1953).

<sup>18</sup> Bd. of Cl. #307 (1951).

<sup>19</sup> Bd. of Cl. #569 (1953).

<sup>20</sup> Bd. of Cl. #95 (1948).

information there are sometimes police reports, and facts turned up by the assistant attorney general's own investigation, if any. For the amount of damages, most reliance is placed upon repair bills and similar evidence of damage submitted by the claimant. If the damage is less tangible, such as for personal injuries, affidavits are often submitted in addition to doctors' and medical bills for the assistant attorney general's consideration.

*Board action.* It is the Board that gives legal significance and value to a claim by either "allowing" or rejecting it. The Board of Claims Act requires:

An award or judgment shall be made only after consideration of the facts surrounding the matter in controversy, and no award or judgment shall be made unless the board is of the opinion that the damage claimed was caused by such negligence on the part of the Commonwealth . . . as would entitle claimant to a judgment in an action at law if the state were amenable to such action.<sup>21</sup>

Attending the meetings at which the Board makes its decisions are the assistant attorneys general who have represented the defendant agencies, the clerk of the Board, and the referee. Attorneys representing clients whose claims are up for consideration may also attend but ordinarily do not—perhaps as much from ignorance of the procedure as from lack of interest.

The procedure of the Board can best be described by briefly considering it first from the standpoint of hearing claims and then from the standpoint of nonhearing claims.

*Hearing claims.* For contested claims, unless an error appears on the face of the record, the referee's recommendation will be changed by the Board only if exceptions accompanied by a memorandum explaining the grounds are filed within twenty days after the referee's report is filed.<sup>22</sup> Copies of the exceptions and memorandum must be furnished the other side.<sup>23</sup> In considering the claims the Board is somewhat analogous to an appellate court except that the Board is freer to make its own findings of fact. The referee, assistant attorney general and claimant's attorney, if present, may be questioned. Although some portions of the evidence

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<sup>21</sup> KY. REV. STAT. 44.120 (1953).

<sup>22</sup> Rules of Practice and Procedure of the Kentucky Board of Claims (1950).

<sup>23</sup> *Ibid.*

may be considered, the record as a whole is seldom read by all members. The claims records are usually apportioned to the three members of the Board equally. Each one reads the records of the claims assigned to him and then states these cases orally to the Board. After a case is stated the Board members express their opinions of the validity of the claim (the Chairman Associate Judge member usually takes the initiative and the others assent or dissent, in which latter case very informal discussion will follow until a decision agreeable to all members is reached).

Irrespective of the Board action taken, whether the referee's report is approved, modified or rejected, no opinion is written and reasons for the action are not in any way expressed beyond what is said (but not recorded) at the meeting. After the meeting, the clerk of the Board prepares the appropriate orders which, when signed by the chairman of the Board, authorize the Commissioner of Finance to draw warrants upon the State Treasurer for their payment.<sup>24</sup>

*Appeal.* Appeal may be taken from the Board action to the Franklin Circuit Court within thirty days if the claim exceeds \$50.00.<sup>25</sup> The statute provides that the method of appeal shall follow section 724 subsection 1 of the Civil Code. This section has since been repealed, but is substantially replaced by Rule 72.01 of the Rules of Civil Procedure. Further limitations on an appeal are imposed by paragraph 2 of KY. REV. STAT. 44.140, which provides:

On appeal no new evidence may be introduced except as to fraud or misconduct of some person engaged in the hearing before the Board. The Court shall hear the cause upon the record before it and dispose of the appeal in a summary manner, being limited in determining: Whether or not the Board acted without or in excess of its powers; the award or judgment was procured by fraud; the award or judgment is not in conformity to the provisions of KRS 44.070 to 44.160; and whether the findings of fact support the award or judgment.

There have been surprisingly few appeals from the action of the Board to the Franklin Circuit Court. Of the first 500 claims only sixteen have been appealed. This may be explained by the

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<sup>24</sup> KY. REV. STAT. 44.100 (1953).

<sup>25</sup> KY. REV. STAT. 44.140 (1953).

fact that, as noted above, the grounds for appeal are relatively narrow. In addition to the restraints imposed on the Circuit Court's review by the statute, the Court of Appeals has held that the findings of the Board may not be altered so long as they are supported by substantial evidence. Even so, six of these sixteen appeals have been successful, although one was subsequently reversed on appeal to the Court of Appeals. The only other reversal by Franklin Circuit Court which was appealed was affirmed by the Court of Appeals on a question of law.

*Nonhearing claims.* The Board acts in a sort of supervisory capacity in reviewing the noncontested claims. The only such claims which reach the Board are in favor of the claimant and agreed to by both parties, since any claims to which the assistant attorneys general remain adverse will either be dismissed by the claimant or be taken to a hearing. Thus no exceptions will be filed and about the only thing for the Board to decide is whether it approves of the practice the assistant attorney general has followed. The most it can do in this respect is to see that substantial evidence supports the assistant attorney general's admission of the allegations or his answer of "no defense," the stipulation of facts, and the amount of damages he agreed to. At the January 1953 Board meeting even this supervisory power was in effect abdicated to the assistant attorneys general when the Board decided that as a matter of procedure at Board meetings they would not look to the evidence behind the stipulations entered into by the claimant and the assistant attorneys general, but would accept the facts and amount of damage stipulated as true and warranted. Noncontested claims can now be approved by the Board in as much time as it takes the member who states the case to report that the stipulation contains facts from which negligence of the defendant agency appears, and that the damages agreed to seem reasonable.<sup>26</sup>

Except for reversals to the extent of lowering or rejecting damages for loss of use, the Board rarely has refused to follow the referee's recommendation in noncontested claims. Statistics show in fact that in any claim, contested or not, chances are overwhelmingly in favor of the Board's acceptance of the referee's report *in*

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<sup>26</sup> However, in the past, the Board has been particularly strict about allowing damages for loss of use of a vehicle. In all probability this attitude will continue and compensation for loss of use will be allowed only upon the presentation of satisfactory evidence to substantiate the claim.

*toto*. Of the first 500 claims, reversal of the referee's recommendation occurred only twenty seven times—seventeen times on the question of liability of the defendant, ten times on the findings as to the amount of damages. There have been no remands to the referee by the Board—proof of the effectiveness of the referee's practice of finding a tentative amount of damages in claims for which he recommends dismissal.

### *Res Adjudicata and Stare Decisis*

Since the Board of Claims is an administrative agency the doctrines of *res adjudicata* and *stare decisis* do not necessarily apply in the exact way they apply in a court of law. Some administrative agencies can deny a claim or application yet hear the same claim or application a year later and grant it. The two general reasons for this are (1) the facts upon which the claim is made may have changed; (2) granting the claim or application, although possibly the outcome of a hearing which is at least quasi-judicial, is primarily a legislative function in which a right is *given* and not merely enforced.<sup>27</sup> It is seen that neither of the reasons applies to claims before the Board. The facts of a claim will not change; like any charge of negligence the claim is decided on past facts. And making the award is essentially judicial, not legislative. Except for the traditional immunity accorded a sovereign, a claimant would have an ordinary cause of action in a court of law. When the immunity is voluntarily removed by the legislature the claimant and sovereign are on the footing of plaintiff and defendant.

In claims before the Board, then, the doctrine of *res adjudicata* should apply as fully as it does in a circuit court. To some extent, possibly completely, depending upon the construction given it, KY. REV. STAT. 44.160 provides that the doctrine applies:

Any action prosecuted to judgment under the provisions of KRS 44.070 to 44.160 shall preclude the right of such claimant to sue the Commonwealth . . . in any other forum.

It is not clear whether the statute refers to judgments of the Board or judgments of the Franklin Circuit Court. The orders of the Board are referred to in the statute as "awards or judg-

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<sup>27</sup> DAVIS, ADMINISTRATIVE LAW, 594-604 (1951).

ments," and it may be intended that a Board order be a bar. Presumably although a later claim before the Board is not expressly forbidden prosecution to judgment also precludes any later claim on the same facts before the Board. And if prosecution to judgment precludes the right to sue in another forum it should make it useless to apply for a special act granting permission to sue in another forum.

In the claims filed to date no problem of *res adjudicata* has arisen, and thus no questions have been answered. Perhaps some light is thrown on the problem, however, by two claims filed by the same claimant. One accident occurred in which the claimant suffered both personal and property damage. Two claims were filed seeking the different types of damages in order to escape the then existing \$1,000 maximum recoverable sum. The allegations of the first claim<sup>28</sup> were denied, but in the second claim, filed at the same time, the assistant attorney general specially demurred on the ground that the claim was based on the same facts as the first, amounting to a split cause of action. Without any action by the Board, the claimant amended his first claim to include the damages of the second and was paid the maximum amount for his single claim.<sup>29</sup> In a state holding that a plaintiff has separate causes of action for personal and property damage caused by only one tortious transaction, the claimant could have maintained these claims separately. If he cannot in a state like Kentucky where only one cause of action exists, it must be because of the doctrine of *res adjudicata*.

For what they are worth two more claims might be mentioned. Both claims arose out of one accident—one was by a husband for personal injuries, the other by the wife for damages to her car. The husband claimed a small amount of damages, in fact only his medical expenses. The wife also claimed a seemingly small amount—\$200.00, when the repair bill showed the damage to her car was \$1,866.00. It did not appear that insurance covered the remainder. Evidence that the Department was at fault was weak; the district engineer's report without recommendations gave the impression that the claimant was at fault. Yet answers admitting

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<sup>28</sup> Bd. of Cl. #50 (1949).

<sup>29</sup> Bd. of Cl. #53 (1949). For a case holding the Kentucky law to be that only one cause of action exists when one tortious act causes personal and property damage, see *Cassidy v. Berkovitz*, 169 Ky. 785, 185 S.W. 129 (1916).



the allegations were filed in both claims, possibly with the attitude that it would be wise to allow the small amounts claimed and foreclose both claimants from any later attempt to recover their full damages. The significant fact in each claim was the Board action: recovery was allowed both times but in each award the Board made it clear that the awards were full settlement for any claims the claimants might have—something the Board never before or after bothered to do.<sup>30</sup> One inference that might be drawn from the Board action is that if *res adjudicata* in its ordinary legal sense applied it would be unnecessary for the Board to frame the award in terms of a release. On the other hand, in the absence of the applicability of the doctrine of *res adjudicata*, the power of the Board to foreclose any future claims on the same facts simply by making one award could well be questioned.

A more fundamental problem is the one of *stare decisis*, but here the problem is not so much whether and to what extent it applies, but how to effectuate its application. KY. REV. STAT. 44.120 provides:

No award or judgment shall be made unless the Board is of the opinion that the damage claimed was caused by such negligence on the part of the Commonwealth or its agents as would entitle the claimant to a judgment in an action at law if the state were amenable to such action.

Thus as to principles of law there can be no doubt that the Board is bound to follow the existing laws of the state.

Were it not for the fact that all questions of law have not been decided by the Court of Appeals and that the referee sits as both judge and jury, the problem would be solved by the above statutory provision. If a question of law is presented to the referee on which he can find no applicable decision he must decide the question with whatever tools exist. Should the same question arise later, however, the referee must rely upon his memory to take him to his earlier decision. At this moment the number of claims filed has passed the 700 mark. With any change in personnel these decided claims will become almost totally useless as precedents because there is no filing system beyond the numerical order in which the claims are filed in the clerk's office, and a combination alphabetical-numerical order system of duplicate files in the assistant attorney general's office.

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<sup>30</sup> See Bd. of Cl. #393 (1951) and Bd. of Cl. #394 (1951).

Since the factual questions presented in all claims which go to a hearing are decided by the same jury (the referee), there ought to be considerable internal consistency in the decision of these many questions. Several decided claims will serve to illustrate that the contrary is sometimes true. Two different claimants sought damages sustained in two separate but similar accidents. Both claimants had opened their car doors into the path of Department trucks. In one claim<sup>31</sup> the answer was "no defense" and the referee recommended payment. After a hearing on the other claim, the referee recommended dismissal, finding the claimant contributorily negligent in opening his car door.<sup>32</sup> In both claims, contributory negligence in opening the car doors would have been a jury question if suit had been in a Circuit Court, and in like manner opposite results might have been reached by separate juries. But under the jury system differing results cannot be avoided, while they can to some extent be avoided when the same person is deciding all the cases.

In two other claims the fact situations seem identical. In each case slow-moving highway equipment was being operated over the crest of a hill, out of sight of oncoming cars and without warning signs. In each case the claimant could not see the equipment until it was too late to stop, yet in one claim recovery was allowed,<sup>33</sup> while in the other the referee found that the claimant should have been in sufficient control of his car to stop within range of his vision, and for a failure to do so was contributorily negligent.<sup>34</sup> Whether the ruling was one of fact or of law, it would seem desirable to reach the same result in both claims in the absence of some variation in material fact.

The problem of consistency will become more serious as the number of claims mounts, and with each change of personnel. There are at least two solutions to the problem, one of which would be to introduce into the methods of the Board a workable index and filing system so that claims previously decided on law or facts similar to one in the process of decision could be located. While this procedure would certainly alleviate the existing situation, it has enough shortcomings to make the effort necessary for

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<sup>31</sup> Bd. of Cl. #317 (1951).

<sup>32</sup> Bd. of Cl. #364 (1952).

<sup>33</sup> Bd. of Cl. #449 (1952).

<sup>34</sup> Bd. of Cl. #337 (1952).

its effectuation relatively unprofitable. The other solution is publication of the more significant awards with the referee's reports and recommendations. Although this solution is more expensive, it will be seen that publication would not only solve the consistency problem, but at the same time might help cure some of the other ills of the Board's development, minor though they have been. The immediate burden of presenting precedents would be put upon counsel for the claimant instead of upon the referee or an assistant hired for that purpose. And it stands to reason that with the bar as a whole knowing the work of the Board, the administration of claims would be strengthened as a matter of pride.<sup>35</sup>

### *Substantive Law of the Board of Claims*

Since the Board's jurisdiction is limited to compensating persons for damages "sustained to either person or property as a proximate result of negligence on the part of the commonwealth, any of its departments or agencies, or any of its agents or employees while acting within the scope of their employment . . ." <sup>36</sup> the substantive law of negligence and related problems are the chief points of discussion here. Prior to 1950 the jurisdiction of the Board was restricted to claims arising out of the negligence of employees or agents of the Highway Department,<sup>37</sup> but it has been extended to cover the negligence of any state agency or employee.

This study of substantive content of claims has been limited to the first 600 claims filed with the Board.<sup>38</sup> Approximately 250 of these were filed before June 15, 1950, the effective date of the new Board of Claims Act, and thus are necessarily against the Highway Department. Even so, of the next 350 claims, filed when

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<sup>35</sup> In a comparatively recent study of federal administrative procedure, the reporting of opinions signed by ICC examiners was approved with emphasis of the point that such procedure gave the examiners an added sense of responsibility and improved the work of the Commission. *Monograph, Interstate Commerce Commission, Attorney General's Committee on Administrative Procedure, 26-37 (1941)*.

<sup>36</sup> KY. REV. STAT. 44.070 (1953).

<sup>37</sup> KY. REV. STAT. 176.290 (1948). At the same time the jurisdiction was extended to cover all agencies, the jurisdictional maximum was raised from \$1,000 to \$5,000.

<sup>38</sup> Some of these 600 are not yet completed but they have progressed far enough for the purposes of the discussion. Beyond the 600 mark, most of the claims have not developed enough to be considered in any figures or percentages.

all agencies were amenable to suit, only forty-six are against agencies other than the Highway Department. For this reason the substantive law of the Board will be discussed briefly under the main categories: claims against the Highway Department and claims against other agencies.

*Highway Department.* (a) *Collision Claims.* As might be expected, claims arising from the negligent operation of Department vehicles constitute the bulk of litigation before the Board. Of the first 554 claims filed against the Highway Department, 344 were for injuries arising from collisions between a Department vehicle and the claimant, his auto, or the auto in which he was riding—all typical highway negligence cases. Negligent acts or omissions included in these claims are, *inter alia*, defective brakes;<sup>39</sup> defective steering mechanism;<sup>40</sup> stopping without signaling;<sup>41</sup> failure to stop at intersection;<sup>42</sup> driving while intoxicated;<sup>43</sup> pulling equipment which was wider than one lane of the highway without proper precautions;<sup>44</sup> following a car too closely;<sup>45</sup> and pulling onto the road without looking.<sup>46</sup> Such situations are not unlike those in which private persons are the parties and thus little difficulty has been encountered in applying ordinary negligence principles to this type of claim.

(b) *Highway Defects.* Comparatively few claims—sixty-seven of the first 554—were filed against the Department for injuries proximately resulting from defects in the highways. It may be that few persons suffer damage because of defects—that highway defects perhaps create more aggravation than tangible, compensable injury. Another factor behind the small amount of claims might be the difficulty of proof. Proximate cause, though as direct as in a collision-type accident, is less easily demonstrated.

Since private persons do not maintain highways, direct analogies to ordinary tort law are nonexistent except where there is some similarity to the duty of a municipal corporation to maintain its streets. It may be helpful, therefore, to analyze a few of the claims

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<sup>39</sup> Bd. of Cl. #4 (1946).

<sup>40</sup> Bd. of Cl. #13 (1947).

<sup>41</sup> Bd. of Cl. #23 (1947).

<sup>42</sup> Bd. of Cl. #40 (1947).

<sup>43</sup> Bd. of Cl. #85 (1948).

<sup>44</sup> Bd. of Cl. #372 (1952).

<sup>45</sup> Bd. of Cl. #395 (1951).

<sup>46</sup> Bd. of Cl. #576 (1953).

to determine the extent of the Department's duty in maintaining highways.

On the basis of decided claims it is clear that the Department has a duty either to correct or warn of defects in the traveled surface of the highway.<sup>47</sup> But where the defect arises because of vis major no duty arises until the Department receives notice.<sup>48</sup> The same requirement of notice applies also where the defect is one which develops through ordinary use of the highway, such as a hole which grows larger and larger as each vehicle pounds over it until it becomes dangerous. The Department is not an insurer.<sup>49</sup> However, one claim indicates that the familiar doctrine of constructive notice applies in such cases, *i.e.*, when a defect has existed long enough for a prudent person with the duty to maintain to have obtained notice, the Department will be held to have had notice irrespective of the actual fact.<sup>50</sup>

Logically no notice should be required when the existence of the defect results from negligence. Generally the Board has followed this theory; for example, no proof of notice was required in a claim involving injury due to debris negligently left in the highway by the Department.<sup>51</sup> Likewise liability was admitted when damages were sought as a result of claimant's collision with a rock alleged to have been left negligently on the road by a Department bulldozer operator.<sup>52</sup>

The dispositions of a few claims seem inconsistent with the above principles. In one, the claimant's car hit what was termed a "blow-up" in the pavement, evidently caused by a change in the temperature. The "blow-up" had occurred just before the accident, so the Department could hardly have had notice. The claim was small and filed by a letter which failed to allege notice and duty to maintain the particular highway. Since a petition was unnecessary, this failure was not fatal.<sup>53</sup> Nevertheless, duty and notice should have in fact existed. The assistant attorney general admitted liability in his answer, possibly not realizing that the im-

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<sup>47</sup> Bd. of Cl. #79 (1948).

<sup>48</sup> Bd. of Cl. #185 (1950).

<sup>49</sup> Bd. of Cl. #120 (1949).

<sup>50</sup> Bd. of Cl. #39 (1948).

<sup>51</sup> Bd. of Cl. #50 (1949); Bd. of Cl. #51 (1949); Bd. of Cl. #52 (1949).

<sup>52</sup> Bd. of Cl. # 275 (1950).

<sup>53</sup> A petition has been subject to demurrer for failure to allege notice, Bd. of Cl. #222 (1953), or duty to maintain, Bd. of Cl. #303 (1950).

plication of the answer is that the Department has a duty to exercise that degree of care in selecting materials for and in building a highway surface which will prevent "blow-ups"—a burdensome duty approaching that of an insurer.<sup>54</sup>

In a later claim damages were asked for repairs made necessary when the claimant's car allegedly hit a hole in the highway. The district engineer reported that no hole could be found, proof that the Department did not have notice of the defect if one in fact existed. Nor was there any fact offered which showed the Department should have had notice. The claim was small, however, and the defense admitted liability for half the damages claimed.<sup>55</sup>

A problem that has given the Board some trouble and which produced a rather unusual situation is the "breadth" of the Department's duty to maintain a highway—whether it has a duty to maintain the shoulders of a highway as well as the traveled surface. There is a conflict in the outcome of the first two claims filed for damages growing out of accidents caused by highway shoulder defects. The first such claim was dismissed by the Board<sup>56</sup> and appealed to Franklin Circuit Court, where the Board's ruling was affirmed. The second claim was also dismissed by the Board, contrary to the referee's recommendation, but on appeal to Franklin Circuit Court the Board's order was reversed and an award entered.<sup>57</sup> Later claims have followed the disposition of the second claim, the Department being held to the same duty to maintain shoulders as it has to maintain the traveled surface.<sup>58</sup>

In the meantime, however, the first claim decided by the Board in regard to this duty was being appealed to the Court of Appeals. In 1952 by a four-to-three decision the Court of Appeals announced the rule to be that the state is not liable for its failure to maintain the shoulders of a highway in a reasonably safe condition for travel except as to defects which are obscured from the view of the ordinary traveler and which are so inherently dangerous as to constitute traps.<sup>59</sup> The judgment of the Franklin Circuit Court affirming the Board's dismissal of the claim was affirmed.

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<sup>54</sup> Bd. of Cl. #176 (1949).

<sup>55</sup> Bd. of Cl. #396 (1951).

<sup>56</sup> Bd. of Cl. #178 (1950).

<sup>57</sup> Bd. of Cl. #227 (1950).

<sup>58</sup> See Bd. of Cl. #313 (1952); Bd. of Cl. #314 (1952).

<sup>59</sup> *Dillingham v. Department of Highways et al.*, 253 S.W. 2d 256 (Ky. 1952).

Presumably the rule announced by the Court of Appeals will be followed by the Board in the future. The few claimants who filed between the institution of the first analogous claim and the final Court of Appeals decision on that claim can consider themselves fortunate.

In view of the slight duty imposed upon the Department in regard to highway shoulders, it is highly unlikely that any duty to a motorist would be put upon the Department regarding the maintenance of ditches and the remainder of the right-of-way. The two claims asserting such a duty were dismissed. In one a claimant contended a ditch into which he careened was negligently maintained—evidently aggravating his damages. The Board sustained a general demurrer, probably because they felt it would be unreasonable to require the maintenance of ditches which would receive careening cars with reasonable safety.<sup>60</sup>

*Injuries to land.* In Kentucky, under the “reverse eminent domain” theory, the state may be sued in circuit court without any legislative waiver of sovereign immunity when land has been “taken” within the contemplation of section 13 of the Constitution.<sup>61</sup> Although intentional acts are usually the basis of such suits, some negligent acts have also been held to constitute a “taking.”<sup>62</sup> Such negligent acts might give rise either to a cause of action in the circuit courts under this theory or to a negligence claim before the Board. About twenty-one such claims have been filed with the Board. The negligence complained of in these claims includes maintenance of a faulty drainage system for highways which caused claimant’s land to flood;<sup>63</sup> improper highway construction which damaged claimant’s spring and well;<sup>64</sup> and the

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<sup>60</sup> Bd. of Cl. #435 (1951). See also Bd. of Cl. #186 (1951) in which claimant’s car wheel dropped over a hidden culvert extending beyond the shoulder as claimant left a drive-in theatre. The claim was dismissed.

<sup>61</sup> For cases in which the theory is applied, see *Keck et al. v. Hafley*, 237 S.W. 2d 527 (Ky. 1951); *Commonwealth et al. v. Kelley et al.*, 314 Ky. 581, 236 S.W. 2d 695 (1951). The theory is discussed in some detail in the second article of this series in 42 Ky. L. J. 163 (1954).

<sup>62</sup> See for example *Department of Highways v. Corey*, 247 S.W. 2d 389 (Ky. 1952) (negligent construction of highway culvert resulting in inundation of the plaintiff’s property).

<sup>63</sup> Bd. of Cl. #32 (1947), special demurrer sustained by the Board because claimant sought an injunction in addition to damages, a remedy beyond the jurisdiction of the Board.

<sup>64</sup> Bd. of Cl. #88 (1948), allowed.

most common complaint, highway blasting which damaged claimants' land.<sup>65</sup>

The Board's jurisdiction to make an award in cases of negligent "taking" has not been questioned. There has been some hesitancy on the part of the Board itself to entertain this type of claim, however. At the January 1953 Board meeting at least one claim which might have been brought in circuit court was postponed for later decision in order that the Board could more fully consider the theory of reverse eminent domain. About the only argument that can be put forth in favor of a refusal by the Board to entertain these claims is that the legislature may have intended the Board to have jurisdiction only over complaints which cannot otherwise be redressed without the consent of the legislature.<sup>66</sup> The result of such an interpretation, however, would be to create confusion and delay if a claimant guessed wrong on the question of whether or not his claim comes within the theory of reverse eminent domain. In view of the many claims already allowed, and the lack of a strong reason for denying jurisdiction over these claims, there is little doubt but that the Board will continue to entertain them.<sup>67</sup> It is a benefit to the citizen to have a more speedy remedy and at the same time the inflexibility of the remedy in circuit courts can be avoided.<sup>68</sup>

*Other negligence.* Among the 554 claims filed against the Highway Department, about 96 have been for general acts of negligence not included in the above categories. The bulk of these claims involves run-of-the-mill negligence situations such as

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<sup>65</sup> Bd. of Cl. #100 (1948); Bd. of Cl. #196 (1950); Bd. of Cl. #226 (1950); Bd. of Cl. #301 (1952). All of these claims were successful.

<sup>66</sup> About the only basis on which such an argument could rest is Ky. REV. STAT. 44.120 (1953) which provides in so many words that an award by the Board can be made only when the damage claimed was caused by such negligence on the part of the Commonwealth as would entitle claimant to a judgment if the state were amenable to an action at law. It could be implied from this that the act was intended to cover only those situations in which the state is not otherwise amenable to suit. An obvious answer, however, is that the act speaks in terms of amenability to action at law for negligence. The reverse eminent domain actions are not predicated on negligence as such, but are to recover damages for an unconstitutional "taking."

<sup>67</sup> Indeed, if either the Board or the circuit courts must lose their jurisdiction over these claims (both will probably continue to hear them) the act would seem to oust the circuit courts of their jurisdiction. See the discussion *infra*, page ●.

<sup>68</sup> Under the theory of reverse eminent domain, since the suit is in the nature of an eminent domain proceeding, the plaintiff does not obtain damages, he obtains the value of the land "taken." For a fuller discussion of this theory, see 42 Ky. L. J. 163 (1954).



a Department truck's backing into a claimant's mailbox.<sup>69</sup> But among these claims are several which are rather unique and illustrative of what may be considered negligence by the Board. Recovery has been allowed when, *inter alia*, a Department employee threw a shovelful of gravel across a road as a car passed, striking the car's windshield;<sup>70</sup> a Department truck, left unsecured in a garage, rolled out and struck claimant's car;<sup>71</sup> brush extending from a Department truck struck the aerial on claimant's car;<sup>72</sup> a chain hanging from the back of a Department truck swung out, hitting the claimant's car;<sup>73</sup> a Department truck hit an overhanging limb, knocking it down onto claimant's auto;<sup>74</sup> a highway marker sign fell from a lamp post onto claimant's head;<sup>75</sup> gravel fell out of a Department truck, striking the claimant's vehicle;<sup>76</sup> sparks from a right-of-way clearing fire flew onto the claimant's passing truckload of hay;<sup>77</sup> and a spike used to secure a traffic counting cable came loose and was picked up by the claimant's tire, injuring the tire.<sup>78</sup>

*Other agencies.* It has been noted that only 350 of the first 600 claims have been filed since agencies other than the Highway Department have been made amenable to suit, and that of these 350 claims only forty six have been filed against other agencies. Barring one unfortunate accident this figure, small as it is, would be reduced by one-third. That accident—the collapse of a foot-bridge in Carter Cave Park—produced fourteen claims before the Board against the Department of Conservation, all of which were allowed after the defense admitted liability in the first claim.<sup>79</sup> The remaining thirty-two claims were filed as follows: against the State Police Department—seven; against the Department of Conservation—nine; against the Department of Welfare—five; against the Department of Agriculture—two; against the Military Department—two; against the Public Service Commission—one; and against

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<sup>69</sup> Bd. of Cl. #106 (1948).

<sup>70</sup> Bd. of Cl. #61 (1947).

<sup>71</sup> Bd. of Cl. # 140 (1949).

<sup>72</sup> Bd. of Cl. #147 (1949).

<sup>73</sup> Bd. of Cl. #156 (1949).

<sup>74</sup> Bd. of Cl. #305 (1951).

<sup>75</sup> Bd. of Cl. #315 (1951).

<sup>76</sup> Bd. of Cl. #400 (1951).

<sup>77</sup> Bd. of Cl. #1 (1946).

<sup>78</sup> Bd. of Cl. #485 (1952).

<sup>79</sup> See Bd. of Cl. #279-#292 (1951).

the Department of Finance—six. The bulk of these claims were for collisions on the highway. But among the few that are not are a claim for injuries sustained when the claimant fell down steps negligently maintained in a state park,<sup>80</sup> and one for the death by electrocution of one of the defendant agency's employees.<sup>81</sup>

On the basis of so few claims little can be said concerning trends, procedural differences, etc., but one natural consequence which appears from the decided claims might be noted: since the other agencies have so few claims filed against them, an individual claim is apt to get more resistance than an individual claim against the Highway Department.

*Strict liability and intentional acts of "negligence."* There remains a group of claims which perhaps should be taken up elsewhere, but which will be discussed here as possible extensions of the substantive law of the Board of Claims. These are the claims in which the facts or the interpretation of the facts shows an absence of negligence—not because of a failure of proof, but simply because something other than negligence caused the damage.

A class of claims in point is the "blasting claims." In some of these negligence was in fact the cause,<sup>82</sup> while in others negligence was not apparent or clearly recognized, yet was possibly present.<sup>83</sup> But in several "blasting claims," whether negligence might have existed or not, the referee obviously recommended payment under the theory of absolute or strict liability without regard to any negligence. In two claims, negligence was never alleged, admitted, stipulated or found to exist. In one of these the referee expressly predicated his recommendation of payment, which was confirmed by the Board, on the theory of absolute liability.<sup>84</sup> In the other the Board ordered payment on the pleadings and stipulation without a referee's report.<sup>85</sup> The referee actually made a finding of no negligence in another claim, but nevertheless recommended payment of stipulated damages.<sup>86</sup>

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<sup>80</sup> Bd. of Cl. #350 (1951).

<sup>81</sup> Bd. of Cl. #319 (1951).

<sup>82</sup> For example, see Bd. of Cl. #196 (1950); Bd. of Cl. #235 (1950); Bd. of Cl. #259 (1951).

<sup>83</sup> See Bd. of Cl. #226 (1950) where the referee recommended payment on the basis of negligence as alleged.

<sup>84</sup> Bd. of Cl. #496 (1952).

<sup>85</sup> Bd. of Cl. #264 (1950).

<sup>86</sup> Bd. of Cl. #100 (1948). See also Bd. of Cl. #551 (1952), in which dam-

It cannot be denied that persons suffering injuries by reason of culpable blasting should be allowed some remedy, but the Board of Claims is exceeding its statutory power when it affords that remedy without a showing by the claimant of negligence. Fortunately the previously mentioned theory of "reverse eminent domain" action can fill the gap in most cases,<sup>87</sup> although it would seem wise to amend the act to allow payment of these claims by the Board.

A class of claims related to the "blasting claims" involves intentional torts. From one claim it appeared that the Highway Department reconstructed a road on property previously conveyed to it by the claimant. The grade of the new road was raised, making the claimant's driveway useless. His claim for damages was apparently predicated on the theory of an interference with his ingress and egress. Negligence was not alleged and properly so because the damage did not result from negligent construction; it flowed from the intentional, careful construction of the road. An answer asserting lack of negligence was filed, but it was followed by a stipulation of facts and \$200 damages. Payment was recommended and awarded, the issue of negligence never being faced.<sup>88</sup> Another claim, perhaps even more illustrative of the point here made, was filed against the Department of Conservation, Division of Game and Fish.<sup>89</sup> The Division's employee, a game warden, shot the claimant, a game law violator, allegedly in the process of arresting him. The shooting was obviously intentional—defenses raised were justifications under the law of arrest and self-defense. After a hearing the referee recommended dismissal, finding the shooting justified. The Board confirmed, but upon appeal to Franklin Circuit Court, where the parties argued only the law of arrest and self-defense, the order of the Board was reversed and the claimant was awarded the jurisdictional maximum, \$5,000. The claim was appealed further to the Court of Appeals where

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ages caused by blasting were allowed because the state is "absolutely liable" under *Rylands v. Fletcher*.

<sup>87</sup> If the blasting is part of a road-building or other public project, the property owners can recover in circuit court against either the county, the Department or the contractor, depending upon the circumstances of the case. See *Combs v. Codell Construction Co.*, 244 Ky. 772, 52 S.W. 2d 719 (1932); *Hall v. Ellis and Brantley*, 238 Ky. 114, 36 S.W. 2d 850 (1931).

<sup>88</sup> Bd. of Cl. #378 (1951).

<sup>89</sup> Bd. of Cl. #367 (1952). For a claim in which recovery was allowed to redress an intentional trespass, see Bd. of Cl. #461 (1952).

the Board's order was reinstated, but the ruling of the court was based on the fact that the Board's finding of justification was supported by substantial evidence and thus could not be disturbed by Franklin Circuit Court.<sup>90</sup> The jurisdictional issue of lack of negligence of a state agency or employee seems never to have been raised.

### *Some Observations on the Board of Claims*

Under the present statute no awards may be made unless the Board is of the opinion that the damage claimed was caused by such negligence of the Commonwealth as would entitle claimant to a judgment in an action at law if the state were amenable to suits.<sup>91</sup> When and if an award is made without proof of negligence the Board is exceeding its power.

In present practice there are two sorts of cases in which the Board occasionally makes awards which are of doubtful statutory validity—the first, some cases in which the assistant attorney general has decided to “settle” and second, cases of intentional “negligence.” The latter, which have already been discussed, are infrequent; enough such claims have not been allowed to indicate any settled practice. Responsible for those which have been allowed is a commendable desire to compensate those persons who deserve to recover from the standpoint of common justice. Unfortunately if they have been injured by something other than negligence, the end result is an attempt to hammer an intentional tort, or a careful act which nevertheless carries with it absolute liability, into negligent conduct. In some few claims no such attempt has been made—the issue of negligence seems simply to have been ignored. The remedy is simple. The Board of Claims Act should be amended to allow recovery for tortious conduct other than negligent acts.

*Settlements and stipulations.* The problem of settlement and the accompanying technique of stipulation is a more complicated one. It would be poor administrative procedure simply to allow

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<sup>90</sup> Commonwealth *et al.* v. Mudd, 255 S.W. 2d 989 (Ky. 1953); *cf.* Stepp v. U. S., 207 F. 2d 909 (1953), an action under the Federal Tort Claims Act in which it was held that the shooting by a sentry of a seaman who failed to halt was use of excessive force in making an arrest and hence was assault and battery exempted from the Act.

<sup>91</sup> KY. REV. STAT. 44.120 (1953).

the assistant attorneys general to settle without limitation since it would tend to replace law with discretion in a field where there is a peculiar need for law.

It would be especially unfortunate for the future development of state liability law if the state were represented by a litigious attorney who attempted to nullify the beneficent purposes of the act. Too free settlement has its perils also; the pendulum of suit against the sovereign swings from immunity to liability and back to immunity, and if the sovereign withdraws consent once given it is usually because of the feeling that unwarranted claims are being allowed.

That some claims not strictly within the present statute may have been allowed is no basis for condemnation of the administration of the act. Practicality demands recognition of certain factors which are apt to be involved when claims of doubtful statutory validity are allowed. They include the cost or "nuisance value" of small claims, the desire of a department to maintain good public relations, the press of business which results in delegation and subdelegation, and differences in judgment on the weight of evidence. Determining which of the above factors was the cause of a given technically unsound result is difficult, but one or many of them are bound to be present, even though the weight accorded the factor by the assistant attorney general or referee is impossible of ascertainment.

*Petty claims.* One explanation for the failure to use all possible defenses is the fact that such failure most often occurs in small claims. If a claimant is determined to pursue his remedy, continued resistance by the assistant attorney general means a hearing which is troublesome and expensive in relation to the amount in issue. The award made when the claimant hit a "blow-up" is an example. Instead of pleading lack of notice, the assistant attorney general admitted liability.<sup>92</sup> The amount claimed was only \$9.80. A comparable claim is the one in which claimant alleged his car hit a hole in a highway. Lack of notice again could have been pleaded, but liability for about half the requested damages was admitted.<sup>93</sup> In a claim in which damages were sought for the cost of repairing a tire punctured by a spike used to secure

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<sup>92</sup> Bd. of Cl. #176 (1949).

<sup>93</sup> Bd. of Cl. #396 (1951).

a cable across the highway, the district engineer could find no negligence—heavy commercial trucks traveling over the cable had torn the spike loose—but recommended payment. The assistant attorney general admitted the facts but denied negligence. The referee, however, recommended an award since the claim was small—\$32.00.<sup>94</sup> In a similar claim, the claimant's tire was damaged by a surveyor's spike on the highway. Although the district engineer reported that "every possible precaution had been taken," the answer admitted liability, followed by a contradictory stipulation that all possible precautions had been taken by the Department. In accordance with the pleadings payment was recommended by the referee and confirmed by the Board.<sup>95</sup>

In some claims the press of business may have joined with the smallness of the claims as a substitute for clear proof of negligent conduct by the state. In these claims the facts presented do not show that the Department was necessarily negligent, but neither does any positive fact appear that indicates the Department was not at fault. It is not unusual in such a claim for the referee to find, on the basis of an admission of liability by the assistant attorney general, that "*apparently* the damage suffered was by reason of the negligence of the agent of the defendant,"<sup>96</sup> or that the Department's driver "*may* have been at fault."<sup>97</sup>

There have been several claims in which fault might well have been placed upon a third party, yet the Department "assumed" liability. For example, a Department truck was forced to swerve by a truck backing into its path, and, in swerving, the Department truck hit claimant's car. No facts appear which indicate the Department driver was driving too fast; on the facts of the record the collision was the proximate result of the third party's act. The district engineer recommended payment, however, and liability was admitted in the answer.<sup>98</sup> In a similar claim an award of \$120 was entered when a Department driver, swerving to miss an oncoming car on the wrong side of the highway, hit claimant's mule.<sup>99</sup> In these claims the attitude of the Depart-

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<sup>94</sup> Bd. of Cl. #485 (1952).

<sup>95</sup> Bd. of Cl. #580 (1952).

<sup>96</sup> Bd. of Cl. #173 (1949).

<sup>97</sup> Bd. of Cl. #95 (1948).

<sup>98</sup> Bd. of Cl. #392 (1951).

<sup>99</sup> Bd. of Cl. #26 (1947). See also Bd. of Cl. #25 (1947).

ment seems to have been to assume liability so long as it did not appear the claimant was the party at fault.

Another claim which is similar to the above in that the accident appeared unavoidable, but dissimilar to the extent that a third party was not involved, was one in which a Department truck skidded into the claimant's auto. Liability was admitted, but the parties then stipulated that the Department truck was traveling at a "safe distance" behind the claimant; that the claimant's car went into a skid (reasons not given); and that the Department's driver, in trying to avoid the claimant, skidded into him. No negligence as such was ever admitted. On the basis of the answer and stipulation, the referee recommended payment for "alleged negligence" and for the first time mentioned faulty brakes on the Department truck.<sup>100</sup>

*Public relations.* It is impossible from a mere examination of the records of claims filed to date to evaluate accurately the part public relations plays in molding the final disposition of claims. Under the present practice, with the assistant attorney general apparently relying strongly on the facts and recommendations contained in the district engineer's or safety supervisor's reports, there is at least an opportunity for public relations to bear on the final decisions. In fairness, however, it should be noted that actual evidence of this factor in the decided claims is rare.

In one claim the damage was sustained by the claimant while driving through a construction area. The claimant's car passed over a rock which caused a leak in the car's oil pan. The district engineer had this to report:

Working zone was protected by "Men Working" signs and Mrs. Stephens followed Windrow for approximately one-fourth ( $\frac{1}{4}$ ) mile; however, this rock was in path of vehicle through action on the part of the Department of Highways and from a *public relations standpoint* we recommend that the department assume liability. . . . (Italics writer's)

The answer admitted liability and the Board ordered an award on the pleadings. Whether the assistant attorney general accepted the engineer's recommendation or admitted liability in the personal belief that the Department was guilty of negligence, the fact

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<sup>100</sup> Bd. of Cl. #230 (1950). It should be noted again that in these claims the facts do not foreclose the existence of negligence, the proof is simply weak.

remains that public relations governed the making of a report which generally has great force in shaping the outcome of a claim.

A safety supervisor's report in another claim in which claimant and a Department driver simultaneously backed their vehicles into each other, recommended:

While no culpable negligence is believed to exist on the part of the driver of vehicle No. 1. (Highway Department) and since it is questionable as to the responsibility in this instance, it is believed that the *public relations aspect* of the case justifies our recommendation that the department accept liability for the damage to vehicle No. 2.

The claim, which was a small one, was allowed.

The question of "public relations," too, is sometimes intertwined with the cost of defending small claims—a hearing can often consume twice the amount claimed. Yet blanket allowance of claims for an amount below a set figure obviously is not the solution. Applied against the sovereign, which is being sued only because it has consented to accept liability under narrowly limited circumstances, public relations is out of place as a factor in judging. It may be that the statute should be amended to allow departmental heads to make small payments and settlements for "public relations" purposes.

*Abdication of the judging function by the Board.* The above-mentioned factors would be of less importance if the Board were not gradually abdicating its function of judging. At the meeting held in January 1953, the Board decided that where an assistant attorney general has entered into a stipulation with a claimant in regard to the facts and damages and the referee approves, the Board will not consider the facts nor need there be evidence in the record which makes out a case. The net result is that the administration of the majority of claims against the state has for all practical purposes been shifted from the quasi-judicial referee and administrative Board and scattered among the various assistant attorneys general and the department heads they represent.

It may be that the results of this procedure will be much the same as would have been reached had the Board heard each case, but that possibility does not warrant the procedure. Although in form the Board appears to be reviewing the action taken by the subordinates in the claims system, in the many claims where the



assistant attorneys general have stipulated facts giving rise to liability and an amount of damages, the Board and referee are in fact and in substance automatically placing their stamp of approval on whatever action has been taken.

The action of the Board in so largely subdelegating its functions is not surprising. The Board is composed of busy men with other interests and the assistant attorney general is capable, conscientious, and has a most judicial temperament. He carries out his dual attorney-judge role in an intelligent fashion. It may not be the system set up by the statute, but it is working well and that is fact which cannot be overlooked in the search for an adequate claims procedure. Nevertheless, it still seems fundamentally unsound to establish a system of claims administration under which department attorneys may settle \$5,000 claims for any of the various reasons private lawyers settle claims for \$5,000, and then enter into a "stipulation" which dispenses with proof of the claim before referee and Board. Too much can hinge on the attorney's temperament, work load, and inarticulate notions of policy to make that a suitable system.

*Suggested remedies.* The remedy would seem to be to amend the act to provide for authority in the assistant attorneys general to settle small claims not worth a hearing (say, up to \$500) either before or after a formal claim is filed. Such administrative settlements should be made subject to the approval of the head of the defendant department and the Attorney General. But there is no reason to submit them to the referee to give them a quasi-judicial stamp. Where larger claims are involved, the adjudicatory process should be preserved and a record should be made for the Board.<sup>101</sup> For this record admitted facts could be stipulated, but where there is a conflict in the testimony of witnesses there should be no "stip-

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<sup>101</sup> Under the Tennessee Board of Claims Act, the Board is forbidden to allow any award "based wholly upon ex parte affidavits of the claimant or his witness but the evidence upon which such award is based must be taken before the assistant attorney general . . . or some other representative of the board, and reduced to writing for examination by the board." TENN. CODE ANN. sec. 1034.31 (Williams Supp. 1950). Thus it appears that a hearing must be held in every case even though the object of the hearing may be only to put formal proof of the validity of the claim into the record for the Board's consideration. In this way the Board can render an enlightened decision and act as a check on the power of disposition which the assistant attorney general holds over the claims. However, the requirement would seem to be disproportionately expensive where small claims are concerned. For a thorough discussion of the Tennessee Act, see Note, 4 VAND L. REV. 875 (1951).

ulation" of the facts to resolve a complicated question of liability. The referee should make a report which would contain the evidence necessary to establish a valid claim—even if only in the nature of affidavits and statements of accounts by doctors and garages, etc. On such a record the Board could exercise real judgment. This would involve little additional load on the assistant attorneys general. It is their present practice to develop complete records, including reports of the safety engineer and highway patrol, affidavits of witnesses on the fault issue, repair estimates, medical bills and affidavits on the damages issues. But these elaborate records are made against a possible hearing and for the attorneys' own satisfaction. The only thing that goes to the referee and Board in a nonhearing case is the stipulation.

Admittedly it would involve some additional work by the referee and Board. The referee at the present time makes a recommendation in all nonhearing cases which he prepares on the basis of the stipulation. The proposed changes would merely give him some additional basis for his award. The Board sits to review the referee's recommendations. The proposed change would merely provide it with a more complete file for use in the difficult cases. The additional burden would not be too great, and the change would restore to the Board the possibility of exercising judgment in nonhearing cases. After all, the task of approving claims and supervising the work of the total claims system was delegated to the Board. It is for the Board finally to authorize the award upon being satisfied it is warranted under the statutes.

The root of the problem of delegation of the judging function is the fact that the act saddles serious adjudicatory functions on a part-time Board composed of officials already overburdened with other full-time responsibilities. It was necessary and inevitable that the Board should seek some way to avoid hearing testimony on every claim in person. The creation of the office of referee and the use of referee's reports was a wise solution—much wiser than delegation to administrative subordinates<sup>102</sup>—and may turn out to be a real contribution to the difficult problem of handling

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<sup>102</sup> Under the Michigan State Administrative Board practice the claims work was delegated to a small claims committee composed of the attorney general, highway commissioner, and state treasurer who in turn subdelegated the work to an assistant attorney general, an assistant highway commissioner, and an assistant treasurer who heard the claims in person.

claims against the state. It has certainly been more effective than some statutory schemes which provided for purely judicial hearings<sup>103</sup> and ended in stagnation.

Perhaps Kentucky's Board-Referee system strikes a good balance between the competing needs of adjudication and administrative discretion. It is not the complete solution and need not be regarded as the final solution. It is submitted that at the present time the adjudicatory element needs to be stressed. The statute should be amended to provide for purely administrative settlement of small claims and the practice should be changed to insure a more definitely adjudicatory handling of larger claims. The scope of liability should be broadened; the decisions should be reported. With these minor changes, Kentucky's Board of Claims offers a workable model for the solution of the knotty problem of sovereign immunity in the average state.

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<sup>103</sup> The new Michigan Court of Claims Act provides for hearings by circuit judges. Last year the clerk's salary was more than the amount of claims satisfied. The Federal Tort Claims Act provides for judicial hearings. One result is an unduly restrictive interpretation of several provisions of the act.